KOPERASI PERUMAHAN KOTAWIRA BHD.

v.

KADIR KASSIM & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-31-2013-1988]
15 JANUARY 1991

CIVIL PROCEDURE: *Application to vary or amend an order of Court - Delay by third party - Rights of third party - Slip rule - Rules of the High Court 1980, O. 20 r. 11.*

On 12 October 1988, the applicant K obtained an order directing the respondent R to pay it a sum of RM958,560.89 (the said sum) which R had been holding as a stakeholder for a housing project called TK. This said sum was the aggregate of the housing loans released by the Government of Malaysia, G, as lenders to R for progressive payments of the purchase price to K.

R had contended that there was a delay in the construction of the houses and as such, the purchasers were entitled to liquidated damages for late delivery. It was also argued that K had not disclosed that the work was suspended because the contractor P had not been paid monies due to it. Further, R said that K's shareholders had refused to give adequate indemnity for the release of the monies - therefore, R was of the opinion that it was its duty in the interest of the purchasers to retain the said sum.

Subsequent to this, P served R with a garnishee order requiring R as garnishee to pay P the debt due to P by K. As a result of the conflicting claims of K and P in these proceedings, R applied by way of interpleader proceedings making P the claimant and requested that R be allowed to pay the said sum into Court so that the claims of each party could be determined. However R withdrew this application at the hearing date.

Another application was made by R for the setting aside or variation of the order dated 12 October 1988 and the setting aside of the garnishee order. G's application for intervention was allowed; in this action. G requests the amendment of the order dated 12 October 1988 in relation to the refund of a certain sum of the said sum.

R contended that certain matters alleged by K were not correct or true, namely that 18 lots had been charged to another party, BPK and were still charged to BPK; R also said that it made a mistake in acknowledging that the amount due to K was the said sum as it had failed to take into account these 18 lots charged to BPK.

The issue for determination was whether the Court could vary the order of 12 October 1988 under O. 20 r. 11 of the Rules of the High Court 1980.

Held:

[1] Order 20 r. 11 applies only in cases where there is a clerical mistake in the judgment or order arising from an accidental slip or omission.

[2] Apart from O. 20, the Court has an inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain, subject to two restrictions:

(a) there has been an error arising in the judgment or order from an accidental omission and not from any other cause and

(b) the Court will refuse to make any correction if something has intervened which would render it inexpedient or inequitable to do so.

[3] Based on the facts of this case, the Court has no power to grant the reliefs sought by G as:

(a) there was clear negligence on R's part in failing to ascertain whether the 18 lots had been transferred to the 18 purchasers and therefore that they were capable of being charged to G. R's negligence resulted in the complication which was not an accidental omission;

(b) furthermore, G in delaying to apply for a correction of the order of 12 October 1988 had allowed the rights of the third party, P to accrue - it would be unjust to prejudice the accrued rights of P;

(c) to allow the correction would inevitably mean the correction of the garnishee order (which was made in Penang) and the Court could not do so as there was no application before the Judge to do so;

(d) even if the said order was obtained by misrepresentation or fraud on K's part, G should bring a fresh action to impeach the said order - G cannot ask the Court to correct or vary the said order under the slip rule.

[G's application dismissed.]

Cases referred to:
Behn Meyer & Co. (M) Sdn. Bhd. v. Agropharm Sdn. Bhd. & Ors. Garnishees [1988] 2 MLJ 636
Hatton v. Harris [1892] AC 547
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143
Hughes v. Justin [1894] 1 QB 667
In re Craigmyle v. Inchcape [1942] 1 Ch 394
In re South American & Mexican Cop. Ex. Pt. Bank of England [1895] 1 Ch 37
Marshall v. James [1905] 1 Ch 342
Moore v. Buchanan & Anor. [1967] 1 WLR 1341
Moore v. Peach Vol; Lxvi LT 198
O'Brien v. Killeen [1914] Vol 11 KBD 63
Preston Banking Co. v. William Allsup & Sons [1894] 1 Ch 141
Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co. [1973] 1 WLR 300
Tong Lee Hua & Anor. v. Chin Ah Kwi [1971] 2 MLJ 75

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11

For the applicant - Harcharan Singh; M/s. Chong & Harcharan
For the respondent - Zainur Zakaria; M/s. Zainur & Maydien
For the claimant - Karin Lim Ai Ching; M/s. Presgrave & Matthews
For the Government of Malaysia - Khoo Guan Huat

JUDGMENT

Lim Beng Choon J:

This is an application made by the Government of Malaysia dated 30 August 1990 by way of summons-in-chambers (encl. 22) for an order that:

(a) the Government of Malaysia be joined as a party to this cause or matter as an intervener;

(b) The order made by the Honourable Mr. Justice Dato' Ajaib Singh dated 12 October 1988 be varied or amended by substituting the sum of RM958,560.89 with the figure of RM806,160.89 so that the sum of RM136,900 could be refunded to the Government of Malaysia;

(c) The said sum of RM136,900 be paid directly by the respondent to the Government of Malaysia;

(d) All further action or proceeding on the order dated 12 October 1988 be stayed until final disposal of determination of this application;

(e) The costs of this application be costs in the cause; and

(f) Such further or other directions as this Honourable Court deems fit and proper.

The application for an order to vary or amend the order of this Court dated 12 October 1988 is made pursuant to O. 20 r. 11 of the Rules of the High Court 1980.

It is necessary to give a brief account of the background of this case before one can appreciate the reason as to why the Government of Malaysia chose to make this application.

On 19 July 1988 Koperasi Perumahan Kotawira Bhd., the applicant in this action, applied by way of an originating summons (encl. 1) for an order directing Kadir bin Kassim, the respondent, to pay the applicant the sum of RM958,560.89 being the amount held by the respondent as stakeholder and that the sum be utilised toward payment for work done. In the affidavit in support of the applicant's originating summons its secretary affirmed an affidavit on 13 July 1988 (encl. 2) stating *inter alia* that by two agreements both dated 21 May 1984 as amended and supplemented by a supplementary agreement dated 21 May 1984 (all collectively hereinafter referred to as "the construction contract") made between Panelex Sdn. Bhd., and the applicant the former agreed to construct the houses comprised in a housing project known as Taman Kotawira project. Particulars of the several units and types of houses to be constructed and the construction and completion of the infrastructure and all civil works related thereto were given. The agreed price for the construction of the several units of houses were RM17,392,336 and the agreed price for the construction of the infrastructure and civil works was RM7,854,900. The applicant had also entered into respective sale and purchase agreements with the respective purchasers who undertook to pay the purchase price/balance of the purchase price to the applicant by instalments and in the manner as prescribed in the third schedule thereto. The respondent was, up to the date of the filing of the originating summons, in possession of the sum of RM958,560.89 being the aggregate of the housing loans released by the Government of Malaysia to the said respondent as stakeholder for payment to the applicant as progressive payments towards the purchase price. The applicant said that up to the date of filing the originating summons it had completed a large portion of the work as evidenced by true copies of the architects' reports which were also handed to the Government of Malaysia indicating clearly the percentage of works done in relation to each lot. The respondent had to date failed to forward to the applicant the relevant progress payments that represented the percentage of work done. The deponent of the affidavit asserted that clause 4 and the third schedule of the respective sale and purchase agreements regulated payment of all progress payments and it was said that the respondent undertook to release monies held by him upon the registration of the charges of the several lots of land on which the several units of houses were built. It was also said that the charges were registered on 18 March 1986 and the respondent was withholding payment ostensibly to cover contingent liability of the applicant to the respective purchasers for liquidated damages for late delivery. However as the manner in which progress payment was to be paid depended on the terms set out in clause 4 and the third Schedule of the sale & purchase agreement, the respondent was not entitled to withhold the said sum of RM958,560.89 and should release the same to the applicant to utilize the moneys towards the completion of the building works.

In his affidavit in reply affirmed on 23 August 1988 (encl. 5) by the respondent, the only complaints of the respondent were that apart from the delay in the construction of the houses for which the respective purchasers were entitled to liquidated damages for late delivery the applicant had not disclosed the fact that construction works in respect of the housing project had ceased and further that the reason for suspension of construction works was because the contractor, Panelex Sdn. Bhd., had not been paid moneys due and payable to the said contractor in respect of work done. Furthermore the applicant had not disclosed the fact that the applicant, in the several meetings with the respondent since 1987, had not been able to state categorically that with the release of the moneys currently held by the respondent the applicant had sufficient funds to ensure that construction of the uncompleted housing units would be effected until completion in accordance with the sale and purchase agreement. The respondent, therefore, had requested the shareholders of the applicant to give the respondent adequate indemnity for the release of the moneys held by him but the said shareholders had not been able to do so. The respondent, therefore, felt that as stakeholder it was his duty in the interest of the purchasers to retain the said moneys.

The secretary of the applicant filed in a further affidavit on 10 September 1988 affirmed by him on 9 September 1988 (encl. 6). In respect of the question of delay he asserted that the delay was due mainly as a result of cash flow problem and not as a result of non-existence of fund. The respondent in withholding the sum of RM958,560.89 contributed toward the delay in continuing with works already commenced. As regard to Panelex Sdn. Bhd., prior to the stoppage of works the company was paid all sums due to it and the applicant was thereafter unable to make payment for further works due largely to the withholding of monies which ought properly to be utilised toward payment to Panelex Sdn. Bhd. Notwithstanding the fact that the applicant was not legally bound to do so nevertheless the applicant had at the meetings with the respondent assured the latter that it had every intention to complete the housing project and to this end the applicant had made certain proposals and schemes to complete the said project. The respondent was further assured that all moneys released to the applicant would be utilised toward payments due to Panelex Sdn. Bhd., for works done. The applicant was prepared to abide by any order of the Court directing that the moneys held by the respondent and future sums to be held by the respondent as stakeholder be paid directly to Panelex Sdn. Bhd., toward the completion of the works.

One final affidavit was filed by the respondent before the hearing of the applicant's originating summons. The affidavit was affirmed on 10 October 1988 (encl. 7). By that affidavit the respondent averred that when he proposed to write to the various purchasers about the stoppage of work and to seek their instructions whether they would wish to have payment made to the applicant or whether they would wish to rescind their respective sale & purchase agreements he was asked by the applicant not to do so as the applicant was sure that the said purchasers would rescind their agreements and the applicant was in no position to repay the said purchasers. Furthermore the respondent was informed by M/s. Presgrave & Matthews that the contractor Panelex Sdn. Bhd., had instituted action against the applicant *vide* Civil Suit 23-115-1988 at the High Court of Malaya at Penang for the sum of over RM1.5 million being moneys due from the applicant to Panelex Sdn. Bhd. Hence the moneys retained by the respondent would not be sufficient to meet the claim of the said contractor. Apart from the said claim the applicant was also in arrears in respect of moneys due to a financial institution in respect of loans taken by the applicant. Therefore without further funding either from other financial institutions or from the shareholders further works could not be carried out. It was unlikely that the applicant would be able to get further funding from other financial

institutions as the only asset the applicant had, had been charged to the financial institution referred to earlier. The respondent was concerned that the several purchasers' interests would be affected if moneys held by him were released to the applicant without their knowledge and concurrence.

The applicant's originating summons for release of the sum of RM958,560.89 came on for hearing on 12 October 1988 and upon reading all the relevant cause papers and upon hearing Counsel for the applicant and the respondent representing himself, Dato' Ajaib Singh J (as he then was) ordered the respondent to pay the applicant the sum of RM958,560.89 being the amount held by the respondent as stakeholder and that the said sum be utilised toward progress payment for work done (encl. 16).

The matter was further complicated when on 13 October 1988 M/s. Presgrave & Matthews sent a letter by fax dated 13 October 1988 and served a sealed copy of a garnishee order to show cause issued by the High Court of Malaya at Penang. The respondent was required to attend before the Senior Assistant Registrar of the High Court of Malaya at Penang on 9 November 1988 on an application by the claimant, Panelex Sdn. Bhd., that the respondent as garnishee do pay the claimant the debt due to the said claimant or so much thereof as may be sufficient to satisfy the judgment together with costs. The judgment sum obtained by the claimant against the applicant was for the sum of RM1,595,997.47 together with interest at 8% p.a. Upon receipt of the garnishee order to show cause the respondent got in touch with the solicitors of the applicant to advise them that the respondent was unable to make payment pursuant to the order made by Dato' Ajaib Singh J dated 12 October 1988 unless the applicant's solicitors were able to set aside the garnishee order to show cause but the said solicitors refused to do so and instead served the order of 12 October 1988 granted by Dato' Ajaib Singh J on the respondent requiring him to pay the moneys to them. In view of the conflicting claims the respondent therefore had no choice but to make an application, which is in the nature of an interpleader proceeding, to this Court by way of summons-in-chambers dated 31 October 1988 (encl. 10). In his application the respondent made Panelex Sdn. Bhd., the claimant to the proceeding. In his application, the respondent prayed that he be allowed to pay the sum of RM958,560.89 into Court and that the applicant and the claimant should appear and state the nature of their respective claims to the said sum. The respondent also prayed that upon payment of the said sum into Court he be discharged from the order of this Court dated 12 October 1988 and also from having to show cause on the claimant's garnishee proceeding *vide* High Court of Malaya at Penang Civil Suit No. 23-115-1988 dated 13 October 1988. The claimant filed in its memorandum of appearance on 5 November 1988 (encl. 13). At the hearing of the respondent's application encl. 10 on 10 November 1988 apparently the respondent withdrew his application. Thereupon this Court allowed the withdrawal with no order made as to costs.

On 27 February 1990 the respondent again made another application by way of summons-in-chambers (encl. 18) whereby he asked for the following orders:

(a) that the order of Court dated 12 October 1988 be varied and/or amended pursuant to O. 20 r. 11 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the Court by substituting the amount of RM958,560.89 with RM806,160.89;

(b) alternatively the said order be set aside;

(c) that all further action or proceeding on the order of 12 October 1988 be stayed until final disposal or determination of this application;

(d) that costs of this application be borne by the respondent; and

(e) such further or other directions as this Honourable Court deems fit and proper.

In support of his application the respondent affirmed an affidavit (encl. 17) and filed it together with his application. I do not propose to reproduce the whole of the contents of the affidavit as the assertions made therein are similar to the assertions made in the affidavit (encl. 21) by one Khoo Guan Huat, the Penolong Peguamcara Perbendaharaan, Bahagian Pinjaman Perumahan in support of the application of the Government of Malaysia mentioned earlier to which I will be referring later. I need only to reproduce some of the averments made by the respondent in his affidavit to show the stand taken by the respondent. He averred that the garnishee order to show cause issued by the High Court of Malaya at Penang had been made absolute. He also averred since the issue of the order of this Court by Dato' Ajaib Singh J on 12 October 1988 and the garnishee order and before payment of the moneys, the respondent discovered that certain averments made by the secretary of the applicant in his affidavit (encl. 2) filed in support of the application of the applicant in the present case were not completely correct. The applicant in the present case was aware of the procedure for the release of moneys by the Treasury of the Government of Malaysia in respect of housing loans granted to Government servants who had purchased houses from the said applicant. One of the terms of the agreements for loans made by the said Government servants was that the Treasury upon approving the housing loan would release the moneys to the respondent upon the respondent's undertaking to charge the relevant land in favour of the Government of Malaysia as security for the loan. The respondent was obliged to ensure that if the land was charged he must utilise the moneys paid to him by Treasury to redeem the land and obtain an undertaking from the chargee to release the title to the respondent upon payment of the redemption sum. Such payment when made would constitute part payment of the purchase consideration payable by the purchaser to the said applicant under the relevant sale and purchase agreement. However the said applicant had earlier applied and obtained a bridging loan from Bank Pusat Kerjasama Bhd. and as security for the said bridging loan, it had charged all the lands comprised in the Taman Kotawira project. As such the titles to the lands were encumbered and would not be released to the purchasers unless the redemption sum was paid. There were problems as to the redemption amount payable and the actual payment thereof to Bank Pusat Kerjasama. Thus the respondent could not make any payment to redeem the relevant lands. He went on to assert that at least 18 lots of the land on which houses were to be constructed for the 18 purchasers who obtained loans from Treasury were still charged to Bank Pusat Kerjasama.

In further support of the respondent's application his accounts clerk affirmed an affidavit on 11 June 1990 (encl. 19) in which he said *inter alia* that he did on or about the month of August 1988 inform the respondent that there was a sum of RM958,560.89 being the aggregate of the housing loans released by the Government of Malaysia to the respondent as stakeholder for payment to the applicant in the present action as progress payment. Subsequently when he went through the accounts he realised that due to an oversight on his part he failed to inform the respondent that on or about the month of August 1988 an aggregate sum of RM15,000 had earlier on 25 January 1988 and 11 May 1988 been refunded to the Government of Malaysia because the respondent had not been able to redeem the relevant titles from Bank Pusat Kerjasama. A further sum of RM136,900 which was to have been paid to the said bank to secure the redemption from the said bank of other titles to enable the charge in favour of the Government of Malaysia to be effected could not be made because of the delinquent account of the applicant in the present action with Bank Pusat Kerjasama.

In opposing the allegations of the respondent the applicant filed in another affidavit affirmed by its secretary on 19 June 1990 (encl. 20) in which it was stated *inter alia* that the applicant had reached a compromise arrangement with Bank Pusat Kerjasama by which the latter bank had agreed among other things to waive their "requirement that 40% progress payment be remitted to us on titles which have been/are to be released by the bank in addition to the redemption sums stipulated" and that the progress claims held by the respondent as stakeholder could be utilised by the applicant to resume works. Bank Pusat Kerjasama also agreed to defer legal action on condition that the progress for the completion of Phase I was carried out to the said bank's satisfaction to which the applicant had undertaken to do. The compromise arrangement was made by letter written by Bank Pusat Kerjasama dated 26 November 1987 and a copy of the letter had been sent to the respondent on 8 December 1988. The applicant had also written to the respondent on 24 February 1988 in which the applicant agreed to pay damages due to the purchasers in respect of the delay in the completion of the respective houses at the rate of 10% p.a. of the purchase price to be calculated up to February 1988. Furthermore the applicant also agreed that its shareholders and the contractor were prepared to give a deed of indemnity to ensure that the houses would be completed within 12 or 18 months and that the deed of indemnity would release the respondent's obligations toward the purchasers of the houses and the Government of Malaysia.

Reverting to the application of the Government of Malaysia (Government) as stated earlier one Khoo Guan Huat, the Penolong Peguamcara Perbendaharaan, Bahagian Pinjaman, had affirmed an affidavit on 29 August 1990 (encl. 22) to support the said application. It was stated in the affidavit that the Treasury approved housing loans to 18 Government servants to help finance the purchase of 18 units of houses in the housing project known as Taman Kobira being developed by the applicant. The said housing loans were to be secured by way of a legal charge over the relevant land in favour of the Government of Malaysia as security for the loans. It was a condition of the approval of the said loans that the charges in favour of the Government should be registered and if the same could not be registered for any reason whatsoever, any monies that was released was to be refunded to the Government and the respondent had given such undertakings to the Government. Copies of the letter of undertaking from the respondent were annexed to the affidavit as Exhibit "A3". As the wordings of all the letters of undertaking are the same I need only to reproduce the relevant part of one of the letters of undertaking which is in this form:

> Kami difahamkan bahawa klien kami sedang memohon pinjaman wang perumahan dari tuan untuk membeli harta HS(D) L&M 1481/84 No. PT 3397, Mukim Kemunting selepas ini disebut "harta itu" dan dengan ini memberi aku janji kami bahawa kami:
>
> (a) akan menerima semua wang pinjaman perumahan terhadap harta itu sebagai "stakeholder";
>
> (b) akan melepaskan apa-apa gadaian yang sedia ada;
>
> (c) akan memindah hakmilik harta itu kepada klien kami;
>
> (d) akan mengambil tindakan untuk mendaftarkan Kerajaan Malaysia sebagai pemegang gadai harta itu;
>
> (e) akan memulang balik semua wang-wang yang telah diterima oleh kami sebagai "stakeholder" kepada pihak tuan sekiranya ada apa-apa sebab yang tidak membolehkan kami mendaftarkan Kerajaan Malaysia sebagai pemegang gadai harta itu.

It was further stated in the affidavit that pursuant to the said approval, the Treasury duly released a sum of money being the land cost of the said properties to the respondent. Reference was then made to paras. 11 and 12 of the affidavit of the applicant's secretary

dated 13 July 1988 (encl. 2) which reads as follows:

> 11. I verily believe that the respondent undertook to release monies held by him upon registration of the charges.
>
> 12. I further verily believe that the charges were registered on 18 March 1986.

It was pointed that the averments of the said secretary were not completely accurate in that the charges in respect of 18 properties purchased by the Government servant referred to in the affidavit of Khoo Guan Huat could not have been and "are not being (sic)" registered in favour of the Government on 18 March 1986 as stated by the applicant's secretary. The Treasury was informed by the respondent by letter dated 14 April 1987 (exhibited as A5 to encl. 21) about this matter. I need only to give a brief account of the contents of that letter. The respondent indicated to the Treasury in that letter that he was not able to transfer the land to the purchasers of the buildings and charged it to the Government because the applicant and Bank Pusat Kerjasama had some problems regarding payment of the redemption sum to secure a discharge of the charge of the land to Bank Pusat Kerjasama. Khoo Guan Huat went on to say in his affidavit that it was a term and condition of the approval of the loans that the charge in favour of the Government had to be registered within one year from the date of the approval failing which the Government had the right to withdraw the loan. As the charges had not been registered in favour of the Government, the respondent must therefore refund the "land cost" released by the Government in respect of 18 properties and up to the date of filing of the affidavit the Government had received only RM16,000. The remaining sum of RM136,000 released to the respondent should therefore be refunded to the Government.

One Karin Lim Ai Ching (Karin Lim) a legal assistant of M/s. Presgrave & Matthews, the claimant's solicitors, affirmed an affidavit on behalf of the claimant, Panelex Sdn. Bhd. on 23 October 1990 in which she averred that the order to show cause dated 19 October 1968 (I think there is a typing error and the date should read 13 October 1988) was served by AR mail on the respondent on 14 October 1988 which was duly received by him on 17 October 1988. In response to the said order the respondent filed an affidavit affirmed on 29 October 1990 (again I think there is a typing error as regards to the date and it should be 29 October 1988) and a further affidavit affirmed on 10 November 1988 in which the respondent affirmed that he would abide by whatever order made by the Court. Subsequently Karin Lim had on 3 January 1989 on behalf of the claimant obtained a garnishee order absolute against the respondent. Pursuant to that order absolute the respondent, as garnishee in the garnishment proceeding, was ordered to pay forthwith to the claimant the sum of RM958,560.89 based on the order of Dato' Ajaib Singh J made on 12 October 1988 obtained by the applicant against the respondent in the present case. The garnishee order absolute was annexed as Exhibit 'KLAC3' to the affidavit and the important term of the said order reads as follows:

> It is ordered that the said garnishee do forthwith pay to the said judgment creditor the sum of RM958,560.89 the debt due from the said garnishee to the judgment debtor.

From the abovestated term of the order made by the learned Judge of the High Court of Malaya at Penang, the learned Judge had accepted the fact that there was a sum of RM958,560.89 owed by the respondent to the applicant in the present case.

Karin Lim went on to say that the claimant was ignorant of any defect (if any) in the order issued by Dato' Ajaib Singh J at the time when the garnishee order was made absolute in Penang.

At the hearing of the application of the Government of Malaysia, the said Government was allowed to intervene. However the two reliefs asked for by the Government namely that the order dated 12 October 1988 made by Dato' Ajaib Singh J be varied or amended by substituting the sum of RM956,506.89 with the figure of RM806,160.89 so that the sum of RM136,900 be refunded to the Government and that the said sum of RM136,900 be paid directly by the respondent to the Government were vehemently contested. Counsel for the Government in his submission explained that when the respondent was served with the garnishee order absolute on 3 January 1989, the respondent had paid the garnishee the sum of RM806,160.89 out of the sum of RM958,560.89 retained by the respondent. There should therefore be a sum of RM152,100 still being retained by the respondent but the respondent had already refunded the Government the sum of RM15,500 much earlier. Therefore the only sum of money still held by the respondent was RM136,900 and that sum should as stated in Khoon Guan Huat's affidavit be refunded to the Government. Counsel for the respondent submitted that firstly the garnishee order absolute could be set aside and he relied on three cases to support his contention namely *Marshall v. James* [1905] 1 Ch 342, *O'Brien v. Killeen* [1914] Vol. 11 KBD 63 and *Moore v. Peach* Vol. Lxvi LT 198. He drew my attention to the headnote of the *Marshall* case which said:

> A garnishee order, made upon evidence afterwards proved to be mistaken, may be set aside although it has been made absolute and has been acted upon.

Secondly he submitted that when this application of the applicant was heard by Dato' Ajaib Singh J there were two matters that were not argued before or brought to the attention of the learned Judge. The first matter was that what were said by the secretary of the applicant in his affidavit of 13 July 1988 (encl. 2) namely that the respondent undertook to release the moneys held by him upon registration of the charges and that the charges were registered on 18 March 1966 (see paras. 11 and 12 of encl. 2) were not correct and not true. The truth of the matter was that 18 lots of the land had not been and could not be charged to the Government because the said lots had already been and still are charged to Bank Pusat Kerjasama. Up to today the lots are still charged to the said bank. The second matter was that when the matter came up for hearing before Dato' Ajaib Singh J, the respondent made a mistake in acknowledging that the amount due to the applicant was RM958,560.89. The respondent failed to take into account that the 18 lots had not yet been charged to the Government. Had he been aware of that he would not have agreed to pay for the 18 lots and the sum owing to the applicant would only be RM806,160.89 because the loans given to the 18 purchasers and held by the respondent as stakeholder were all subject to the condition that the moneys should not be released until the charges of the 18 lots had been duly registered under the name of the Government. Furthermore had the attention of Dato' Ajaib Singh J been drawn to these two matters the learned Judge would not have made the order of 12 October 1988 for payment of the sum of RM958,560.89 and instead would have directed payment of only RM806,160.89. Thirdly Counsel submitted that the facts brought out at the hearing before me were not new facts but they were facts that existed at the hearing before Dato' Ajaib Singh J which were not disclosed partly because of the false statements made by the secretary of the applicant. Based on the principle laid down in *Marshall v. James* case (*supra*), the order of Dato' Ajaib Singh J of 12 October 1988 should be set aside otherwise great injustice would be done both to the Government and to the respondent.

Counsel for the applicant on the other hand submitted that it was far too late for the Government to move the Court to set aside the order of 12 October 1988 particularly when the respondent had knowledge of the transaction and had the opportunity to correct any errors. More importantly said Counsel, third party's right had accrued namely the claimant's

right under the garnishee order absolute. In any case no injustice was done to the Government as the respondent had given an undertaking. The respondent was the author of his own action. Counsel relied strongly on *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143, *Behn Meyer & Co. (M) Sdn. Bhd. v. Agropharm Sdn. Bhd. & Ors. Garnishees* [1988] 2 MLJ 636 and a few English cases to support his submission.

Counsel for the claimant in her submission in support of the submission made by Counsel for the applicant also contended that firstly the garnishee order absolute was made based on the order of Dato' Ajaib Singh J. Counsel also relied on the *Behn Meyer & Co. (M) Sdn. Bhd*. case to support her contention. Secondly she argued that if this Court were to allow the order of Dato' Ajaib Singh J to be varied then an application should be made to vary the garnishee order absolute. In any case on the authority of *Moore v. Buchanan & Anor*. [1967] 1 WLR 1341 an order once perfected could not be amended when the amendment could affect a third party. Thirdly in the garnishment proceeding the respondent had filed an affidavit in which he had said that he would abide by the order of the Court, and that statement of his must amount to an estoppel. She then cited the case of *In re South American & Mexican Co. Ex. Pt. Bank of England* [1895] 1 Ch 37 where the principle of estoppel laid down in that case was cited with approval in the case of *Tong Lee Hua & Anor. v. Chin Ah Kwi* [1971] 2 MLJ 75.

Counsel for the respondent in his reply stated the facts which he had brought before this Court were not made available to the Judge who made the order of 12 October 1988. The case of *Behn Meyer* was therefore distinguishable. In any case irregular judgment where the sum given was too much rendered the irregular judgment void. He brought my attention to the case of *Hughes v. Justin* [1894] 1 QB 667 cited by Counsel for the Government earlier to support his contention.

As the arguments of Counsel acting for the respective parties were directed to the question of whether this Court could vary the order of 12 October 1988 pursuant to O. 20 r. 11 of the Rules of the High Court 1980 (RHC) I shall first deal with the scope of that order.

Order 20 r. 11 of the RHC is in these terms:

> Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

This rule therefore applies only in cases where there is a clerical mistake in the judgment or order or an error arising from an **accidental** slip or omission. Apart from the rule of the Court has an inherent power to vary its own orders so as to carry out **its own meaning** and to make its meaning plain. The scope of the power of the Court to vary its own orders had been dealt with almost a century ago in the case of *Hatton v. Harris* [1892] AC 547. In that case the law forbade the allowance of interest exceeding the limit of the penal sum, unless there be exceptional circumstances to justify it. Notwithstanding the legal prohibition the decree of the trial Judge was so expressed as to carry interest at 6% until the principal sum of £500 was paid and that the omission from the decree of words restricting interest to the limit of the penal sum of £1,000 was due to an accidental slip. In holding that the Court had inherent jurisdiction to correct the error Lord Watson said at p. 560:

> When an error of that kind has been committed, it is always within the competency of the Court, **if nothing has intervened which would render it inexpedient or inequitable to do so,** to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce. The correction ought to be made upon motion to that effect, and is not a matter either for appeal or for rehearing. (Emphasis is mine).

The power to correct clerical mistakes or accidental omissions extends not only to those made by ministerial officers of the Court but also to those made by a party or his advisers.

The power of the Court to correct its own judgment or order is subject to two restrictions. Firstly there has been an error arising in the judgment or order from an **accidental omission** and not from any other cause. Thus in *In re Craigmyle v. Inchcape* [1942] 1 Ch 394 where Counsel accidentally omitted to ask for costs Morton J in allowing the judgment to be corrected to include an order for payment of costs said at pp. 396-397:

> It is submitted in the present case by Mr. Stone for the infants that there has been an error arising in the order from an accidental omission, that is to say, the accidental omission of the Counsel concerned to ask me to deal with these costs. It is clear that, if a Judge's attention is directed to a particular point, and applying in his mind to that point, he decides it, there can be no alteration under this rule even if the Judge has fallen into some manifest error. It is also established, I think, by *Preston Banking Co. Ltd. v. William Allsup & Sons* and *MacCarthy v. Agard* that, if the error in the order has arisen **as a result of deliberate misrepresentation**, the case does not come within the rule, as such an error could not, I apprehend, be said to arise from an accidental slip or omission. (Emphasis is mine).

Secondly, before an application is made to correct a judgment or order on the ground of omission, something had happened which would render it inexpedient or inequitable to do so then the Court should refuse to make any correction. This is clearly stated in *Hatton v. Harris* (*supra*) by Lord Herschell at p. 558 of the reported case:

> There is one observation which I ought to make, and it is this, that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to show that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made. There might be a ground of that description which would include the tribunal to say "No; although this is a slip, and one which would have been corrected at the time, you have delayed so long that you have allowed rights to grow up which it would now be unjust to prejudice, and it is impossible to make the correction."

It is interesting to note that in *Moore v. Buchanan* (*supra*) (this case was cited by Counsel for the applicant) Lord Diplock suggested that the power of the Court to refuse to make a correction is not confined only to a case where the rights of third parties have intervened. Thus after citing the observation of Lord Herschell, Lord Diplock went on to say at p. 138 of the reported case:

> Those observations of Lord Herschell would appear to suggest that it is only when the rights of third parties have intervened, based on the existence of the order and ignorance of any circumstances which would tend to show it was erroneous, that the Court had jurisdiction to refuse to make the correction.
>
> The Judge's attention was not called to a passage in the speech of Lord Watson, which makes it clear that the discretion of the Court to refuse an order is much wider than that which Lord Herschell's words might suggest.

Lord Diplock then read the passage of Lord Watson's speech in the *Hatton* case which I have cited earlier. Thereafter His Lordship went on to say at p. 1349:

> In my view the speech of Lord Watson and the words which I have read out correctly describe the jurisdiction and the extent of the discretion which lies in a Judge when he is asked to exercise his power under the "slip" rule to correct a judgment to make it accord with what his intention was at the time when he pronounced it orally.

The principles laid down in the *Hatton v. Harris* case and the *Moore v. Buchanan* case were approved by the Privy Council in *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* [1973] 1 WLR 300 at 306 where it was said:

> Finally there is the question of discretion. Even though the requirements of the slip rule are satisfied, and the Court is not precluded from making an order under it by any *res judicata* in the narrow or the extended sense, there is nevertheless a discretion in the Court to refuse an order under the slip rule if something has intervened which would render it inexpedient or inequitable to do so: *Moore v. Buchanan* [1967] 1 WLR 1341 following Lord Watson in *Hatton v. Harris* [1892] AC 547, 560.

Our then Federal Court adopted a similar approach in defining the scope of O. 20 r. 11 of the RHC. In *Hock Hua Bank Bhd. v. Sahari bin Murid* (*supra*) Chang Min Tat FJ (delivering the judgment of the Court) said at p. 144:

> Clearly the Court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O. 28 r. 11 of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the Court: *Re St. Nazaire Co., Kelsey v. Doune, Hession v. Jones*, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

It is to be noted from the cases cited above that even if a judgment or order has been obtained by fraud or misrepresentation a Court should not correct its order either under O. 20 r. 11 or its inherent jurisdiction. This is made explicit by Lord Halsbury in the case of *Preston Banking Co. v. William Allsup & Sons* [1894] 1 Ch 141 (this case was brought to my attention by Counsel for the applicant) where His Lordship said at p. 143:

> I am of the opinion that this appeal should be dismissed. If by mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. But this is an application to the Vice-Chancellor in effect to rehear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to rehear is made to the particular Judge who made the order is immaterial; for if one Judge can rehear the order another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction; but he has no jurisdiction to rehear or alter this order.

Applying the above legal principles to the application made by the Government of Malaysia, it is clear that I have no power to grant the reliefs asked for by the Government. I say so for these reasons. In the first place in failing to ascertain whether the 18 lots had been transferred to the 18 purchasers and therefore capable of being charged to the Government, it is not an accidental omission but clear negligence on the part of the respondent. He took for granted that the 18 lots were capable of being charged to the Government and on that basis the matter was argued before Dato' Ajaib Singh J. In all his affidavits filed in opposition of the applicant's application at the material time there was no indication at all that the land was not or incapable of being charged to the Government. The issue of the charge was never raised at all simply because the respondent had failed to make a check which he was enjoined to do by his letter of undertaking made to the Government. His negligence brought about the complication which certainly is not an accidental omission. In the second place even

had it been an accidental slip, I do not think I should exercise my discretion to correct the order of 12 October 1988 simply because in delaying to apply for a correction of the said order the Government has allowed the rights of third party namely the claimant to accrue which it would now be unjust to prejudice the accrued rights of the claimant. To allow the correction I would also inevitably be correcting the garnishee order absolute made by the High Court in Malaya at Penang which I certainly cannot do as there is no application made to me to do so. The cases relied by the Counsel for the respondent relating to the power of the Court to set aside a garnishee order absolute are of no assistance to the respondent. At any rate upon my scrutiny of the cases relied by Counsel for the respondent, I agree with V.C. George J where he said in his judgment in *Behn Meyer & Co. (M) Sdn. Bhd. v. Agropharm Sdn. Bhd. & Ors.* (*supra*):

> These old English decisions (relied by Counsel for the respondent), cannot be said to be reasoned decisions and run contrary to the principles and reasoning expressed and given by the Federal Court in the *Hock Hua Bank Bhd.* case. The question is not whether the order ought to be set aside but whether the Court has the jurisdiction to do so. (Words in parenthesis are mine).

In the third place even if the order of 12 October 1988 was obtained by misrepresentation or fraud on the part of the applicant, the Government should bring a fresh action to impeach the said order - it cannot ask the Court to correct or vary the said order under the slip rule.

As regards to the contention of the Counsel for the Government that the applicant has obtained a judgement for a sum of RM958,560.89 when in fact he is only entitled to a lesser sum of RM806,160.89, the answer to this contention is that there is no dispute that at the hearing of the matter before Dato' Ajaib Singh J, the Government had at the material time released the greater sum to the respondent as stakeholder. The applicant was merely asking for the greater sum retained by the respondent to which he was entitled under clause 4 read with the third schedule of the sale and purchase agreements entered between the respective purchasers and the applicant and the matter has already been adjudicated upon by Dato' Ajaib Singh J when he made the order of 12 October 1988. It is certainly not my function to re-open the case at this juncture. The contention of the Counsel of the Government is to my mind unsustainable.

For the above reasons the application of the Government of Malaysia is dismissed with costs.

Also found at [1991] 2 CLJ 1529